Supreme Court, U. S.
FILED
JUN 24 1996
CLERK

No. 95-1711

In the Supreme Court of the United States

OCTOBER TERM, 1995

ALLDERS INTERNATIONAL (SHIPS) LTD., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
ROBERT S. GREENSPAN
SANDRA WIEN SIMON
DAVID V. HUTCHINSON
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether a cruise ship concessionaire's claim for lost business expectancy (profits) without any physical impact to its property is prohibited in admiralty by *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303 (1927).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Aktieselskabet Cuzco v. *THE SUCARSECO*, 294 U.S. 394 (1935) (*THE TOLUMA*)	11, 12
Amoco Transp. Co. v. *S/S MASON LYKES*, 768 F.2d 659 (5th Cir. 1985)	12
Barber Lines A/S v. *M/V DONAU MARU*, 764 F.2d 50 (1st Cir. 1985)	6, 7
Bethlehem Steel Corp., In re, 631 F.2d 441 (6th Cir. 1980), cert. denied, 450 U.S. 921 (1981)	10, 11
Canadian Pac. (Bermuda) Ltd. v. *United States*, 534 F.2d 1165 (5th Cir. 1976)	5
Cargill, Inc. v. *Doxford & Sunderland, Ltd.*, 785 F.2d 1296 (5th Cir. 1986)	11
Channel Star Excursions, Inc. v. *Southern Pac. Transp. Co.*, 77 F.3d 1135 (9th Cir. 1996)	7
Domar Ocean Transp., Ltd. v. *M/V ANDREW MARTIN*, 754 F.2d 616 (5th Cir. 1985)	7, 8
Federal Commerce & Navigation Co. v. *M/V MARATHONIAN*, 528 F.2d 907 (2d Cir. 1975), cert. denied, 425 U.S. 975 (1976)	7
Getty Ref. & Mktg. Co. v. *MT FADI B*, 766 F.2d 829 (3d Cir. 1985)	4, 7
Louisiana ex. rel. Guste v. *M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985), cert. denied, 477 U.S. 903 (1986)	4

Cases—Continued: Page

M. & J. Tracy, Inc. v. *THE ROWEN CARD*, 116 F. Supp. 516 (E.D.N.Y. 1953) 12

Marine Navigation Sulphur Carriers, Inc. v. *Lone Star Indus., Inc.*, 638 F.2d 700 (4th Cir. 1981) 9, 10

Pacific Vegetable Oil Corp. v. *M/S NORSE COMMANDER*, 264 F. Supp. 625 (S.D. Tex. 1966) 5

Robins Dry Dock & Repair Co. v. *Flint*, 275 U.S. 303 (1927) 3, 4

Texas Eastern Transmission Corp. v. *McMoRan Offshore Exploration Co.*, 877 F.2d 1214 (5th Cir.), cert. denied, 493 U.S. 937 (1989) 8

United States v. *Panama Transp. Co.*, 174 F. Supp. 592 (S.D.N.Y.), aff'd, 268 F.2d 739 (2d Cir. 1959) 12

Venore Transp. Co. v. *M/V STRUMA*, 583 F.2d 708 (4th Cir. 1978) 10, 12

Statutes:

Suits in Admiralty Act, 46 U.S.C. App. 741 *et seq.* 5

Miscellaneous:

Restatement (Second) of Torts (1977) 7

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1711

ALLDERS INTERNATIONAL (SHIPS) LTD., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-3a) is unpublished, but the decision is noted at ___ F.3d ___ (Table), 1996 WL 19149. The opinion of the district court (Pet. App. 4a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1996. The petition for a writ of certiorari was filed on April 15, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(c).

STATEMENT

1. Petitioners are Allders International (Ships) Ltd. and Eagle Star Reinsurance Co., Ltd., its

insurer.[1] The QUEEN ELIZABETH II (QE2) is a cruise ship owned by Cunard Line Ltd. (Cunard). Petitioner operates nine retail shops on board the QE2. Pet. App. 2a, 8a.

Petitioner entered into a concessionaire's agreement with Cunard on February 17, 1987, for the right to sell products on board the QE2. C.A. App. A143-A166. Petitioner agreed to contribute money towards the renovation of the shop area on the QE2. *Id.* at A144-A145. At the conclusion of each voyage, Cunard was entitled to retain a percentage of petitioner's "Gross Receipts." *Id.* at A155. Under its agreement with petitioner, Cunard was not

> liable for failure to perform any obligation under th[e] Agreement or for any loss to [Petitioner] or others to the extent that such performance is prevented or loss is caused by Acts of God, war, fire, collision, directions of underwriters, arrest, order or restraint by governmental authorities or others, acts of terrorism, labor disturbances or disputes, civil commotions, weather conditions and considerations of the safety of the vessel * * *, foundering of the vessel or breakdowns of or damage to its hull, machinery and fittings, acts, neglect or default by the Master, pilots, officers, crew or other servants of Cunard in the navigation or management of the vessel, inability to secure or failure of supplies including fuel, requisition of the

---

[1] Although Allders International and its insurer, Eagle Star Reinsurance Co., are petitioners, this case arises out of the activities of Allders, and we therefore refer to Allders as "petitioner."

vessel or other circumstances beyond Cunard's control.

Id. at A160-A161.

On August 7, 1992, the QE2 touched rocks and/or boulders on the bottom of Vineyard Sound near Martha's Vineyard, Massachusetts. The QE2 was damaged by the contact and was out of service for a period of time for repairs. As a result of cruise cancellations during this period, petitioner sustained economic losses. Pet. App. 2a; C.A. App. A23. Petitioner sued the United States to recover $253,000 in damages, the amount of profits petitioner claimed it lost from the cancellations. Pet. App. 2a.[2] Petitioner claimed that the QE2's grounding was caused by the negligence of a federal hydrographer who left the rock ledge unmarked on government navigation charts in 1939. *Ibid.*[3]

2. The district court granted the United States' motion to dismiss petitioner's complaint. The court held that the dispositive issue was whether petitioner can recover for economic loss in the absence of physical harm. Pet. App. 4a. The district court recognized that the leading case on this issue is this Court's decision in *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303 (1927). As the district court noted, in *Robins* the defendant dry dock negligently damaged a vessel's propeller. The time charterer of the vessel sued for loss of use of the vessel for the extra time it was laid up in dry dock for the repair of the propeller. In

---

[2] Petitioners' appendix erroneously reprints the amount as "$253.000." Pet. App. 2a.

[3] Cunard has filed a separate action for its losses, estimated at close to $50 million. That action is still pending. *Cunard Line Ltd.* v. *United States*, 94 Civ. 5637 (S.D.N.Y.).

denying recovery, Justice Holmes noted for the Court that

> as a general rule * * * a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. The law does not spread its protection so far.

Id. at 309 (citation omitted) (quoted in Pet. App. 5a-6a).

The district court also noted that "[m]ost courts have read *Robins Dry Dock* to establish a bright line rule against recovery for economic loss caused by an unintentional maritime tort absent physical damage to property." Pet. App. 6a, citing *Getty Ref. & Mktg. Co.* v. *MT FADI B*, 766 F.2d 829 (3d Cir. 1985); *Louisiana ex rel. Guste* v. *M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985) (en banc), cert. denied, 477 U.S. 903 (1986).

The court also rejected petitioner's claims that it suffered physical damage to a proprietary interest, Pet. App. 8a-9a, and that it was engaged in a "common venture at sea" which would preclude *Robins Dry Dock* from applying to its loss, *id.* at 10a-13a.

Hence, the district court concluded that

> [i]n both *Robins Dry Dock* and the present case (1) plaintiff had a contract with the shipowner, (2) plaintiff sued for lost profits flowing from that contract, (3) the damage allegedly was caused by defendant's negligence, and (4) plaintiff's harm was purely financial. Plaintiff's claim is essentially one for negligent interference with perfor-

> mance of its contract and therefore falls squarely within the prohibition of *Robins*.

Pet. App. 14a.

3. The court of appeals affirmed in an unpublished summary order, Pet. App. 1a-3a, for "substantially the same reasons set forth in [the district court's opinion]." *Id.* at 3a. It also "considered all of the additional arguments raised by [petitioner], and f[ou]nd them to be without merit." *Ibid.*

ARGUMENT

1. The courts below correctly held that *Robins Dry Dock* applied to bar the relief petitioners sought.[4] Petitioner had a contract with Cunard for a space charter of retail shops aboard the QE2. Petitioner here is akin to a time charterer of less than the complete vessel. See *Pacific Vegetable Oil Corp.* v. *M/S NORSE COMMANDER*, 264 F. Supp. 625 (S.D. Tex. 1966). Under *Robins Dry Dock*, a time charterer of the QE2 would have no claim against the government arising out of its grounding. The charterer of less than the complete vessel should be in no better position.

Petitioner's claim here is for lost profits arising out of interference with its space charter with

---

[4] Under admiralty law, petitioner may pursue maritime remedies against the United States that would be available against a private party in like circumstances, tempered by other applicable federal law. Under the Suits in Admiralty Act, 46 U.S.C. App. 741 *et seq.*, the government has waived its sovereign immunity for maritime causes of action that do not involve government vessels or cargo but that would be within the admiralty jurisdiction if private parties were involved. See *Canadian Pac. (Bermuda) Ltd.* v. *United States*, 534 F.2d 1165, 1168 (5th Cir. 1976).

Cunard. In its complaint petitioner alleges that, because of the "fault, negligence and breach of duty" of the United States, the QE2 was caused to ground, and that as a result of that grounding "several subsequent cruises by the QE2 were cancelled, and the operation" of the retail shop was prevented. C.A. App. A24. The claim submitted to petitioner's insurer was for "loss of profits." *Id.* at A250. Petitioner has made no claim for any physical damage to any property. As the courts below correctly concluded, petitioner's claim is "for negligent interference with performance of its contract" with Cunard. Pet. App. 14a.

Petitioner is a purely "financial" plaintiff. *Barber Lines A/S* v. *M/V DONAU MARU*, 764 F.2d 50, 54 (1st Cir. 1985). It is a renter of space on the QE2, the rent for which is a percentage of the gross receipts of its shops at the end of the voyage. During the period that the QE2 had no voyages because of the grounding, petitioner owed Cunard nothing. The grounding in this case interfered only with petitioner's business expectancy. As the courts below correctly held:

> In both *Robins Dry Dock* and the present case (1) plaintiff had a contract with the shipowner, (2) plaintiff sued for lost profits flowing from that contract, (3) the damage allegedly was caused by defendant's negligence, and (4) plaintiff's harm was purely financial. Plaintiff's claim is essentially one for negligent interference with performance of its contract and therefore falls squarely within the prohibition of *Robin*.

Pet. App. 14a.

2. The *Robins Dry Dock* rule has endured repeated examination, challenge, and reevaluation. It has been followed by courts and embraced by commentators.

Thus, while the Ninth Circuit in *Channel Star Excursions, Inc.* v. *Southern Pacific Transportation Co.*, 77 F.3d 1135 (1996), recently acknowledged that it had made "limited exceptions" to the *Robins Dry Dock* rule, it also stated that the "rule has been strictly followed in the First, Second, Third, Fourth, Fifth and Eleventh Circuits." *Id.* at 1138, citing *Barber Lines A/S, supra.*[5]

3. Petitioner contends (Pet. 7) that the court of appeals' decision is contrary to decisions of other courts of appeals. That contention is mistaken.

a. Petitioner asserts (Pet. 7) that there is a conflict between the judgment in this case and *Domar Ocean Transportation Ltd.* v. *M/V ANDREW MARTIN*, 754 F.2d 616 (5th Cir. 1985). Petitioner argues (Pet. 15-19) that it has a sufficient proprietary interest in the QE2 to come within that case's "integrated unit" exception to *Robins Dry Dock*. Petitioner, a tenant of the QE2, made improvements to the shop spaces as one term of its rental

---

[5] The Second Circuit considered the applicability of the *Robins Dry Dock* rule in *Federal Commerce & Navigation Co.* v. *M/V MARATHONIAN*, 528 F.2d 907 (1975), cert. denied, 425 U.S. 975 (1976), and, observing that there is no "indication that the Supreme Court has moved away from the *Robins* rule," explicitly held that plaintiffs could not recover for economic loss absent damage to their property. *Id.* at 908. The First Circuit wrote that the principles underlying *Robins Dry Dock* were legally sound and rested on a "firm policy foundation," noting that the same judges who chose to remove other recovery limitations left this one in place. *Barber Lines A/S*, 764 F.2d at 53. The Third Circuit adhered to this rule which, the court noted, was defined by Justice Holmes in *Robins*, incorporated in the Restatement (Second) of Torts § 766C (1977), and embraced by leading commentators. *Getty Ref. & Mktg. Co.*, 766 F.2d at 830-832.

agreement; petitioner contends that it thereby gained an ownership interest in the QE2.

Petitioner's funding of improvements to the QE2, however, is not like the alterations to the vessel that *ANDREW MARTIN* held sufficed to create an "integrated unit." In *ANDREW MARTIN*, Domar Ocean Transportation chartered a vessel, the CINDY CENAC, and altered its design to make it suitable for use with Domar's barge DOMAR 7001. 754 F.2d at 617-618. When damage to the DOMAR 7001 barge prevented use of the CENAC by Domar, the court allowed Domar to recover for lost use of the CENAC. *Id.* at 621.

ANDREW MARTIN was explained in *Texas Eastern Transmission Corp.* v. *McMoRan Offshore Exploration Co.*, 877 F.2d 1214, 1225 (5th Cir.), cert. denied, 493 U.S. 937 (1989). In that case, Marathon Oil, a petroleum production company, sought to recover for lost use of a pipeline it used to transport natural gas from wells in the Gulf of Mexico to shore. Marathon maintained certain portions of the pipeline and had paid for construction of part of the pipeline. *Id.* at 1219-1220. Whereas Domar owned the barge that was damaged in its case, however, Marathon did not actually own any of the pipeline in question. *Id.* at 1225. The court of appeals held that Marathon could therefore not recover for lost use of the pipeline, because it could show no physical damage to any property it *owned*. *Ibid.*

The relationship between petitioner and Cunard in this case is analogous to that between Marathon and its pipeline company in *Texas Eastern*. Here, petitioner secured for its concession business use of space on board the QE2. As part of the terms of an agreement to rent certain space on QE2 to petitioner,

Cunard required that petitioner fund certain changes in the rental spaces and share its revenues with Cunard.

Neither of these payments granted petitioner any proprietary interest in the QE2. Under its agreement with Cunard, when petitioner vacates the QE2 concession spaces at the close of the contract period, it will take nothing with it, ceding all payments and improvements to Cunard. If there is a termination before the end of the seven-year rental agreement, Cunard would pay petitioner liquidated damages of 1/84th of the renovation expenditures for each month remaining on the terminated contract. C.A. App. A159.

The only proprietary interest petitioner had in the QE2 was its interest in its supplies and products brought on board for sale, none of which was physically damaged. Moreover, as the district court found, even if petitioner had a proprietary interest in the retail shops on the QE2, this "proprietary interest in the shops cannot also constitute an interest in the whole of the damaged vessel." Pet. App. 9a.

b. Petitioner also errs in asserting (Pet. 7) that "[t]his case would also have been allowed to proceed in the Fourth and Sixth Circuits." Petitioner cites (*ibid.*) *Marine Navigation Sulphur Carriers, Inc.* v. *Lone Star Industries, Inc.*, 638 F.2d 700 (4th Cir. 1981), which held that, where the plaintiff corporations did not allege or show physical damage to their properties or persons, the defendant vessel owner and charterer were *not* liable to corporations that suffered losses from business interruption and similar damages due to the closing of a river to marine traffic for several months. The court explicitly chose not to pass judgment on cases allowing recovery of damages

for economic loss by clam diggers and commercial fishermen as a result of oil spill injury, rejecting application of any such principle to "claims of indirect economic loss resulting from physical collision of vessels." *Id.* at 702. The opinion would afford no basis for petitioner to recover its lost business expenses in this case.

Petitioner also cites (Pet. 7) *Venore Transportation Co.* v. *M/V STRUMA*, 583 F.2d 708 (4th Cir. 1978), which allowed recovery by a company that time chartered a ship damaged by the defendant. The court allowed the time charterer to recover "charter hire paid." *Id.* at 711. The court noted, however, that "[it did] not intend * * * to suggest that the time charterer is entitled to lost profits. *That kind of claim is foreclosed by Robins Dry Dock.*" *Ibid.* (emphasis added).[6] Here, petitioner paid no hire to Cunard for the time the QE2 was undergoing repairs. Even under *Venore*, then, petitioner is not entitled to recover the business expectancy it seeks.

In *In re Bethlehem Steel Corp.*, 631 F.2d 441 (6th Cir. 1980), cert. denied, 450 U.S. 921 (1981), also cited by petitioner (Pet. 7), the court of appeals affirmed the district court's dismissal of claims against a shipowner for recovery for economic loss resulting from vessel delay. See 631 F.2d at 444, 449. The court of appeals noted that U.S. courts "have determined that the damages suffered by detained vessels which are

---

[6] See also 583 F.2d at 711 ("Our only holding is that when there has been no suspension in the payment of charter hire during the period when the vessel is out of service, the time charterer who has paid the charter hire is entitled to recover what the owner would have been entitled to recover had those payments been suspended.").

not otherwise injured are too remote or indirect to warrant recovery." *Id.* at 448-449.

4. Finally, petitioner also claims (Pet. 20-23) that it falls within the "common venture at sea" exception to the *Robins* rule. Where a tortfeasor injures a ship engaged in a common venture at sea with a cargo owner, *Robins Dry Dock* does not preclude recovery by the cargo owner. See *Aktieselskabet Cuzco* v. *THE SUCARSECO*, 294 U.S. 394, 400 (1935) (*THE TOLUMA*) (where cargo was carried under a general average statement that apportioned expenses and losses, so far as they were of a general average nature, between vessel owner and cargo owners, cargo owners could recover for own risk at sea due to participation in common venture).

Petitioner argues (Pet. 22-23) that it was engaged in a common venture at sea with Cunard because it shared in the risks and perils of maritime ventures. That is incorrect. A common maritime venture is a situation where "ship and cargo *share by law* in certain of the risks, rights, and responsibilities of a voyage," *Cargill, Inc.* v. *Doxford & Sunderland, Ltd.*, 785 F.2d 1296, 1297 (5th Cir. 1986) (emphasis added), or where "the sacrifice or expenses f[a]ll upon the whole adventure and [a]re to be assessed in proportion to the share of each in that adventure," *THE TOLUMA*, 294 U.S. at 401. Petitioner's business is not cargo and its claim for damages here is for lost profits, not out-of-pocket costs. Had the arrangement between petitioner and Cunard constituted a common venture, petitioner would have been required to share liability for negligence in the navigation of QE2 in the event of

a collision or allision.[7] Petitioner also owes nothing to Cunard in the way of space hire, see *Venore Transp. Co.* v. *M/V STRUMA*, *supra*, or freight, see *Amoco Transp. Co.* v. *S/S MASON LYKES*, 768 F.2d 659 (5th Cir. 1985).[8]

Petitioner's reliance (Pet. 22) on Clause 6.0 in the Agreement between Cunard and petitioner is misplaced, for Clause 6.0 is in no way a sharing of the risks of marine perils. It is merely a term of the rental agreement specifying that petitioner has no claim against Cunard for certain losses to concessionaires when the loss is the result of circumstances beyond

---

[7] Petitioner errs in attributing legal significance (Pet. 22) to the fact that the cargo in *THE TOLUMA* and petitioner's shops on the QE2 were both located on vessels. While perhaps necessary, physical location alone does not suffice to show a common venture at sea. *THE TOLUMA* held that *Robins Dry Dock* did not preclude recovery by the cargo owners of amounts they "had paid as general average contributions," 294 U.S. at 398, "a loss for which [the tortfeasor] was responsible," *id.* at 405; there was no claim for lost business expectancy. See also *id.* at 401 (cargo owner's claim was for contributions toward a "sacrifice or extraordinary expenses necessarily made or incurred to avert * * * peril and with a resulting common benefit to the adventure").

[8] The fact that petitioner bore the risk of its own lost profits in certain circumstances does not bring it within the scope of cases such as *M. & J. Tracy, Inc.* v. *THE ROWEN CARD*, 116 F. Supp. 516 (E.D.N.Y. 1953), or *United States* v. *Panama Transport Co.*, 174 F. Supp. 592, 595 (S.D.N.Y.), aff'd, 268 F.2d 739 (2d Cir. 1959), which allowed recovery for losses to owners of amounts of "hire" that were suspended due to the damage to the vessels, even though the charterers had indemnified the owners and received a right of subrogation.

Cunard's control. C.A. App. A160-A161.[9] As the district court correctly concluded, petitioner "has offered no evidence of an arrangement subjecting it to risks comparable to the general average responsibility of the plaintiffs in *The Toluma*." Pet. App. 12a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
ROBERT S. GREENSPAN
SANDRA WIEN SIMON
DAVID V. HUTCHINSON
Attorneys

JUNE 1996

---

[9] Clause 6.0 of the Agreement is quoted at page 2, *supra*. Petitioner may have a claim against Cunard arising out of the grounding if it was Cunard's management's decision to take the QE2 into the waters of Vineyard Sound and if that decision constituted negligence.